

Christine Joyce

From: Don Johnson
Sent: Monday, April 09, 2007 11:45 AM
To: Board of Selectmen
Subject: FW: Article 39 discussions and negotiations

Forwarded for your information, relative to Article 39.

Regards,
Don

From: Schnorr, Thomas [mailto:TSchnorr@eapdlaw.com]
Sent: Monday, April 09, 2007 12:09 PM
To: Don Johnson; Stephen Anderson
Cc: Roland Bartl; Manager Department
Subject: RE: Article 39 discussions and negotiations

One quick observation: the proposed amendment would make wireless facilities USE of residentially zoned land and land within 1000 feet of schools and playgrounds not permitted. The Acton zoning bylaw does not authorize the Acton ZBA to grant zoning USE variances, thus under Chapter 40A the ZBA has no legal authority to grant a use variance. I would be shocked if the ZBA, in the face of the zoning bylaw's prohibition on use variances, would issue one anyway. Too, the First Circuit case involving Plainville and Omnipoint that you recently circulated does not address that point; in that decision the court commented that the Plainville ZBA said it couldn't grant the use variance (for the same reason that the Acton ZBA would say it had no authority to issue a use variance), but the court went on to say that that lack of authority was not the only issue. In the Omnipoint case, Omnipoint filed for two alternative forms of zoning relief: a use variance (that the Plainville ZBA said it couldn't grant because it had no authority) and by asking the ABA to determine that facilities constituted a "public utility" use that would have been a permitted use under the zoning bylaw. The First Circuit court ruled that the ZBA's decision, in saying no authority as to use variance, but then refusing to rule on the public utility question, amounted to an "effective prohibition" thereby entitling Omnipoint to the Federal district court ordered relief: a court order that the variances and other permits be issued.

Tom Schnorr

Thomas G. Schnorr
Partner
617.239.0363
main fax 617.227.4420
direct fax 617.316.8359
tschnorr@eapdlaw.com

Edwards Angell Palmer & Dodge LLP
111 Huntington Avenue
Boston, MA 02199-7613 USA

Assistant: Carol Connors
617.239.0358
cconnors@eapdlaw.com

www.eapdlaw.com

From: Don Johnson [mailto:djohnson@acton-ma.gov]

4/9/2007

Sent: Monday, April 09, 2007 10:36 AM
To: Stephen Anderson; Schnorr, Thomas
Cc: Roland Bartl; Manager Department
Subject: FW: Article 39 discussions and negotiations

Steve and Tom:

Forwarded for your information, consideration and comment where appropriate. (Steve on procedural matters and Tom on the cell tower subject itself.)

Regards,
Don

From: Dore' Hunter
Sent: Sunday, April 08, 2007 10:16 PM
To: breichlen@makemwireless.com; Roland Bartl
Cc: Manager Department; Walter Foster (office)
Subject: Article 39 discussions and negotiations

Bruce,

I had a very long telephone conversation, that I initiated, tonight with Will Tuffin.

My purpose was to attempt to broker a last minute compromise re Article 3, namely to move to strike the petitioners' Article's paragraphs 1., 1.1, and the numbers 1.2, retaining the text of 1.2 but substituting the word "required" for "requested" in the retained final sentence.

As I had suspected Will immediately indicated that such would have to be coupled with a moratorium on accepting cell tower applications. In response to that I noted the TCA requirement for reasonable expedition in processing cell tower requests and suggested that I would not object to such, but could only consider extending the end date of any committee discussions to the time of a fall Town Meeting. However, Will did not express any interest in doing a deal at that point in our conversations.

Nevertheless Will later called me back, saying he had talked to several petitioners and they had all had "questions" why, if I was willing to broker a compromise, we could not append the necessary language changes to the Article 38 motion, saying it was easier for the Selectmen to change motion language than the petitioners. I explained that the deal would effectively be for Article 39 as it is currently written to be carried over to the Fall Town Meeting, at which time, if some other way of protecting residences and schools from cell towers etc. had been worked out the substitute measure would hopefully be adopted. If no substitute measure came forth from the committee created then the present Article 39 could be revived. I told him that any "deal" could not include the passage of Article 39 now, and in any event an amended 38 along these lines would conflict with Article 39. I also pointed out that an Article 39 motion amended as he suggested would be prone to "scope" issues since it does not mention residential zones or schools. Will did not seem to feel that ended the discussion, and we may talk further tomorrow.

[Assuming this discussion progresses favorably we might need Counsel's take on the best means of accomplishment at the Meeting. I don't know, for instance, if a Motion to Postpone Consideration of an Article to a Time Certain (Majority Vote) can be worded such that the "Time Certain" is a Fall Town Meeting for which no date has yet been set. I suspect not. If not I would go with go with Postpone Indefinitely to avoid a 2/3rd vote requirement.]

NOTES re argumentative portions of the conversations follow:

Needless to say, In the process of attempting to reach a compromise I once again failed to convince Will he/they might be creating an "effective prohibition" by seeking to impose his by-law amendment over the other restrictions, physical and legal, that might pertain to cell tower siting across the Town.

In the process of the discussion Will advanced arguments, which he said have their origins in what has happened in Lincoln, Stow and Carlisle (I think those were the towns, I was not taking notes) where, because the town involved had allowed a tower somewhere in a district (overlay?) where it should not otherwise have been allowed, they could not avoid other towers in the same zone. Therefore, he says, since the Great Hill towers are on ARC land, those zones are fully available everywhere in Town for cell towers now. He didn't think it mattered that the Great Hill land was owned by the Water District.

Will also advanced an argument that conservation lands were open for towers. He said he had read 7-9 deeds (parcels not identified) and saw nothing in them that would preclude tower construction. I could not get him to admit that there might be restrictions on conservation lands re commercial construction.

Will further said that the Zoning Board of Appeals could overturn any Planning Board decision, thus the tower applicants could go to them after a Planning Board refusal and so there could be no effective prohibition.

His response to the almost all grayed out map that Roland so laboriously constructed was to the effect that, 2 percent or so of available land for towers was more than enough.

Regards,
Dore' Hunter
Selectman & VSO, Town of Acton, MA
Telephone: 978-263-0882
Email: dorehunter@aol.com

See what's free at AOL.com.

Boston, Ft. Lauderdale, Hartford, New York, Providence, Short Hills, Stamford, West Palm Beach, Wilmington, London (Representative office)

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